Saskatchewan
Labour Relations Board

GOVERNMENT OF SASKATCHEWAN, EXECUTIVE DIRECTOR, EMPLOYMENT STANDARDS, Appellant v MARCEL MARTELL, Respondent and REGINA'S SHINE SHOP LTD., Respondent

LRB File No. 065-21; December 1st, 2021
Vice-Chairperson, Barbara Mysko (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

For the Appellant, Government of Saskatchewan, Executive Director, Employment Standards:	Alyssa Phen
For the Respondent, Marcel Martell:	Self-Represented
For the Respondent, Regina's Shine Shop Ltd.:	No one appearing

Section 4-10 of *The Saskatchewan Employment Act* – Appeal of Adjudicator Decision – Original Wage Assessment Appeal – Statutory Deposit on Appeal – Cheque Returns Insufficient Funds – Adjudicator Permits Appeal to Proceed for Substantial Compliance.

Consequence of Imperfect or Non-Compliance is Clear – Appeal Period Mandatory – Strict Compliance Necessary – Substantial Compliance not Applicable – Adjudicator Decision Remitted – Appeal Period to be Confirmed.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: These are the Board's Reasons for Decision in relation to an appeal filed by the Director of Employment Standards [Director] on May 31, 2021, pursuant to section 4-10 of *The Saskatchewan Employment Act* [Act]. The appeal concerns the decision of an adjudicator in LRB File No. 022-21, dated May 10, 2021 with supplemental reasons, dated May 14, 2021, made pursuant to Part II of the Act. The Director had issued a wage assessment to the employer, Regina's Shine Shop Ltd., and two directors of the company, in the amount of $14,635 for wages owing to the employee, Marcel Martell.[1] The employer was directed to pay the total amount within 15 business days after the date of service of the wage assessment or commence an appeal pursuant to section 2-75 of the Act.

[1] File No. 1-004559.

[2] The company and directors filed an appeal pursuant to section 2-75. The adjudicator was selected to hear the appeal pursuant to subsection 4-3(2) of the Act. The Director raised a preliminary issue, stating that the respondents had failed to submit the required $500 appeal deposit within the 15 business day time limitation as required by section 2-75.

[3] The adjudicator's decision, dated May 10, 2021, concludes that the deposit was filed on time, but in the alternative, that the employer was in substantial compliance with the statutory appeal requirements.

[4] On this appeal, the Director states that the adjudicator erred in interpreting subsections 2-75(2), (4), and (5) of the Act, erred by applying the principle of substantial compliance to these provisions, and erred by determining that she had jurisdiction to hear LRB File No. 022-21. The Director also requested a stay of the decision but later withdrew that request.

[5] At Motions' Day on August 3, 2021, this matter was scheduled for a hearing to be held on October 26, 2021 via Webex. Mr. Kleemola for the company was in attendance and indicated that he was available for the hearing on that date. Deadlines were set for written submissions. The Board later provided the links to the hearing to all parties.

[6] The Board received written submissions from the Director but no written submissions from the company or Mr. Martell. The Director's representatives and Mr. Martell attended the hearing. No one attended for the company or company directors. The Board received no indication from the company or company directors that they would be unable to attend the hearing, nor any request for an adjournment, and so the appeal hearing proceeded in their absence.

Facts:

[7] On May 5, 2021, the Director's delegate raised with the adjudicator the preliminary issue, relying on the following timeframe:

- *The Director served the business corporation and both corporate directors on February 4, 2021 via registered mail.*
- *The Director calculated the appeal period ran from February 5 to 26, 2021.*
- *The appellants submitted the grounds of appeal and the deposit cheque on February 24, 2021.*
- *On February 26, 2021, the cheque was returned as insufficient funds.*
- *On March 2, 2021, our appeal coordinator notified me of the NSF cheque. I emailed the appellants the same day advising [them] of the deficiency.*
- *On March 5, 2021, the appellants submitted a new deposit cheque (which cleared the bank).*

[8] The delegate followed up with a statement: "I would be pleased to provide any documentation required in order to confirm the above information". There is no record that the adjudicator requested any such documentation.

[9] In the decision, the adjudicator described the relevant timeframe as follows:

- *On February 4, 2021, the wage assessment was served on the company and Directors via registered mail.*
- *According to subsection 9-9(4) of the Act, the fifth business day following its mailing, and therefore the date of service, is February 11, 2021.*
- *Factoring in the Family Day holiday on February 15, 2021, the 15-business day appeal period ran from February 12, 2021 to March 5, 2021.*
- *The deposit cheque cleared on March 5, 2021, and therefore the deposit was filed on time.*

[10] Following the decision, the Director's delegate wrote to the adjudicator and provided clarification of the timeline, as follows:

- *On January 27, 2021, the Director sent the wage assessment to the company and Directors via registered mail.*
- *On February 24, 2021, the appellants filed the notice of appeal and cheque.*
- *On February 26, 2021, the cheque was returned as insufficient funds.*
- *On March 5, 2021, the appellants submitted a new deposit cheque which cleared.*

[11] According to the Director, Mr. Kleemola signed for the notices on behalf of both company directors on February 4, 2021, and therefore the appeal period ran from February 5 to 26, 2021.

[12] Further to the Director's email, the adjudicator wrote, on May 14, 2021:

> *Thank you to everyone for your responses and thank you to Andrew for clarifying the facts regarding service of the Wage Assessment by registered mail. I stand by my decision regarding my jurisdiction to hear the appeal for the reasons described in my May 10th email...*

[13] The Director takes the position that the timeline is not in dispute, and that the adjudicator's decision rested not on a finding that the deposit was made before the expiry of the appeal period but instead on the decision to apply the principle of substantial compliance.

[14] Assuming that the service date was February 4, 2021, the employer has not strictly complied with the statutory time limitation for a deposit. Subsection 2-75(2) of the Act requires an appeal from a wage assessment to be filed with the Director within 15 business days after the date of service of the wage assessment. If the company and directors were served with the wage assessment on February 4, 2021, the appeal would have had to have been filed and the required

amount deposited with the Director on or before February 26, 2021. The cheque was filed with the Director on February 24 and returned for insufficient funds on February 26. The required amount was not deposited until March 5.

Relevant Statutory Provisions:

[15] The following provisions of *The Saskatchewan Employment Act* are relevant:

> ***2-75****(1) Any of the following may appeal a wage assessment:*
> *(a) an employer or corporate director who disputes liability or the amount set out in the wage assessment;*
> *(b) an employee who disputes the amount set out in the wage assessment.*
>
> *(2) An appeal pursuant to this section must be commenced by filing a written notice of appeal with the director of employment standards within 15 business days after the date of service of a wage assessment.*
>
> *(3) The written notice of appeal filed pursuant to subsection (2) must:*
> *(a) set out the grounds of the appeal; and*
> *(b) set out the relief requested*
>
> *(4) If the appellant is an employer or a corporate director, the employer or corporate director shall, as a condition of being eligible to appeal the wage assessment, deposit with the director of employment standards the amount set out in the wage assessment or any other prescribed amount.*
>
> *(5) The amount mentioned in subsection (4) must be deposited before the expiry of the period during which an appeal may be commenced.*
>
> *(6) Subsections (4) and (5) do not apply if moneys that meet the amount of the wage assessment or the prescribed amount have been paid to the director of employment standards pursuant to a demand mentioned in section 2-70.*
>
> *(7) An appeal filed pursuant to subsection (2) is to be heard by an adjudicator in accordance with Part IV.*
>
> *(8) On receipt of the notice of appeal and deposit required pursuant to subsection (4), the director of employment standards shall forward to the adjudicator:*
> *(a) a copy of the wage assessment; and*
> *(b) a copy of the written notice of appeal.*
>
> *(9) The copy of the wage assessment provided to the adjudicator in accordance with subsection (8) is proof, in the absence of evidence to the contrary, that the amount stated in the wage assessment is due and owing, without proof of the signature or official position of the person appearing to have signed the wage assessment.*
>
> *(10) On the final determination of an appeal, the amount deposited pursuant to subsection (4):*
> *(a) must be returned if the employer or corporate director is found not to be liable for the wages; or*
> *(b) must be applied to the wage claims of the employees if the determination is in favour of the employees in whole or in part and, if there is any part of the amount remaining after being applied to those wage claims, the remaining amount must be returned to the employer or corporate director.*

[16] Also relevant is subsection 9-9(4) of the Act, which states,

> *(4) A document or notice served by registered mail or certified mail is deemed to have been received on the fifth business day following the day of its mailing, unless the person to whom it was mailed established that, through no fault of that person, the person did not receive the document or notice or received it at a later date.*

[17] The prescribed amount of the deposit is set out at section 37 of *The Employment Standards Regulations*:

> *37 For the purposes of subsection 2-75(4) of the Act, the amount of deposit required from an employer or corporate director who disputes liability or the amount set out in the wage assessment is the amount set out in the wage assessment to a maximum of $500.*

Analysis and Decision:

Jurisdiction:

[18] The Board has jurisdiction to hear this appeal. The adjudicator's decision was made pursuant to Part II of the Act. The Board has jurisdiction to hear a Director appeal of a decision of an adjudicator on an appeal pursuant to Part II on a question of law or a question of mixed fact and law, pursuant to section 4-10 of the Act.

[19] The Director's argument rests on an assertion that the timeframe pertaining to the service of the notice of appeal is not in dispute. Assuming this assertion is correct, there is no outstanding issue pertaining to the timeframe, and no question as to the Board's jurisdiction over said issue. If this assertion is not correct, the Director's argument, in the context of the unique factual basis of the decision, raises a question of fact that may be characterized as a question of law as per *Wieler v Saskatoon Convalescent Home*, 2014 CanLII 76051 (SK LRB) [*Wieler*].

[20] The remaining issues before the Board, relating to the adjudicator's interpretation of section 2-75 of the Act and the application of the principle of substantial compliance, are questions of law.

Standard of Review:

[21] The Board has recently confirmed that correctness is the standard of review to be applied to an appeal on a question of law brought in relation to a decision of an adjudicator pursuant to Part III of the Act: *Christine Ireland v Nu Line Auto Sales & Service Inc.*, 2021 CanLII 97414 (SK LRB) [*Ireland*]. In *Ireland*, the Board performed a full exercise in statutory interpretation to

determine the appropriate standard of review, as directed by the Court of Appeal in *E.Z. Automotive Ltd. v Regina (City)*, 2021 SKCA 109 (CanLII) [*EZ Automotive*].

[22] *EZ Automotive* holds that the purpose of this exercise is to determine the respective roles that the Legislature intended the adjudicator and the Board to fulfil and that the exercise is to be performed in line with the modern principle of statutory interpretation, as has been codified in section 2-10 of *The Legislation Act.* The modern principle directs the Board to read the provision in its ordinary context and in its grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[23] In *Administrative Law in Canada, 6th Ed.,* (Toronto: LexisNexis Canada, 2017), at 186-90, Sara Blake also explains the reason for and purpose of performing this interpretative exercise:

> ***6.30*** *The Dunsmuir-type standard-of-review analysis is based on a constitutional foundation by which the court's role is to preserve the rule of law while being sensitive to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by the legislature. The court, when reviewing tribunal decisions, respects the intentions of the democratically elected legislature by giving deference to the wisdom of the tribunal decision on the merits. This is why the deferential standard of review of reasonableness is usually applied by the court to the review of decisions made by statutory decision makers. However, this constitutional foundation is not present when a statutory tribunal decides an appeal from a decision of another statutory decision maker. They are both on the same side of the constitutional divide. Each of them has a statutory mandate to perform. For these reasons the Dunsmuir-type deferential standard of review should not be applied unless the statute prescribes it.*
>
> ***6.31****... Where there are two statutory decision makers, one reviewing the decision of the other, both have statutory mandates to serve the public interest. The Court's standard of appellate review is not an easy fit.*

[24] Due to recent changes to the appellate standard of review in matters involving a statutory right of appeal, this analysis is no longer wholly applicable. It remains the case, however, that the courts' standard of appellate review is not an easy fit with the mandate of administrative tribunals which are created by the Legislature. Instead, it is necessary to analyze and determine the internal standard of review that the Board is to apply in reviewing decisions of adjudicators, made pursuant to Part II.

[25] Sara Blake explains that the purpose of the analysis is "to identify which of the issues raised in the appeal are central to the statutory purpose of creating a second-tier decision maker". She provides a non-exhaustive list of questions that assist in interpreting the statute. These include: "What is the statutory mandate of the reviewing decision maker including the statutory purpose of establishing a process of statutory review prior to judicial review?"; "What is the value

added by creating an appeal tribunal?"; "What is the statutory mandate of the first decision maker?"; "What is the nature of the issue under appeal and the relative expertise of each decision maker on that issue?"; "What does the statutory appeal provision prescribe as to the grounds of review, the scope of the remedial authority, whether it has authority to substitute its opinion for that of the first decision maker, and the process for decision making?"; and, "What is the role of the first decision maker in the proceeding before the second decision maker?"

[26] In accordance with these directions, the Board will proceed to perform a full exercise in statutory interpretation in relation to appeals of adjudicators' decisions made pursuant to Part II.

[27] Pursuant to subsection 2-80(1), the minister with the responsibility for the administration of the Act is empowered to appoint an employee of the ministry as director of employment standards. Subsection 2-80(2) permits the Director to delegate to any person the exercise of any powers given to the Director. Pursuant to section 2-74, the Director (or delegate) may issue a wage assessment against an employee or corporate director. The wage assessment must indicate the amount claimed and direct the employer or corporate director to, within 15 business days after the date that the wage assessment is served, pay the amount claimed or commence an appeal pursuant to section 2-75.

[28] Section 2-75 allows an employer, corporate director, or an employee to appeal a wage assessment by filing written notice of appeal with the Director within the required time limitation. The appeal is to an adjudicator appointed by the Lieutenant Governor in Council pursuant to section 4-1 for the purpose of hearing appeals or conducting hearings pursuant to Parts II, III and V of the Act. There is no provision to allow for an appeal of a wage assessment to anyone other than an adjudicator.

[29] The Board in *Ireland* describes the appointment of adjudicators in some detail:

> *[64] Part IV of the Act provides details with respect to appeals to Adjudicators. Unlike the OHS Officers and OHS Director, who are employees of the Ministry, Adjudicators are chosen and appointed to be independent of the Ministry. They are appointed by the Lieutenant Governor in Council after consultation by the Minister with labour organizations and employer associations. While the Act allows for qualifications to be prescribed by regulation, no qualifications have been prescribed. Adjudicators are appointed for a term not exceeding three years, may be reappointed, and are paid for their services at rates approved by the Lieutenant Governor in Council (section 4-1).*

[30] The provisions governing the selection, rules of procedure, and powers of adjudicators hearing appeals pursuant to Part II are the same as those which apply to adjudicators appointed

pursuant to Part III and were considered by the Board in *Ireland* (at paras 65-7). The Board Registrar selects the adjudicator to hear the appeal, the adjudicator has broad procedural powers pursuant to sections 4-4 and 4-5 and following the hearing the adjudicator can dismiss or allow the appeal or vary the decision being appealed, pursuant to section 4-6. The adjudicator is required to provide written reasons for a decision.

[31] Leaving aside the categories of persons directly affected, the framework for appealing a Part II adjudicator's decision to the Board is substantially the same as that which applies to adjudicators appointed pursuant to Part III. The general right to appeal to the Board is on a question of law. The Director's right to appeal is on a question of law or a question of mixed fact and law. Pursuant to both subsection 4-8(6) and subsection 4-10(5), the Board may affirm, amend or cancel the decision or order of the adjudicator, or remit the matter back to the adjudicator for amendment of the decision or order. Pursuant to sections 4-9 and 4-10, an appeal from the Board to the Court of Appeal requires leave of a judge of the Court of Appeal and is restricted to a question of law.

[32] For the current purposes, there is no substantive difference between the statutory framework governing appeals of adjudicators' decisions made pursuant to Part II and those made pursuant to Part III. In *Ireland*, the Board found that the relevant provisions demonstrate a legislative intent that the Board apply a standard of review of correctness to the adjudicator's decision on a question of law (para 70).

[33] The Board's function, relative to appeals of adjudicators' decisions made pursuant to Part II, is a traditional appellate function. The Board is the apex internal appellate tribunal. By finding that the correctness standard of review applies to the Board's review of adjudicators' decisions on questions of law, the Court of Appeal is able to "effectively exercise its appellate oversight function" (*EZ Automotive*, at para 74), and is not, instead, restricted to reviewing the correctness of the Board's adoption and application of a different standard of review, such as reasonableness. As explained in *EZ Automotive*, "[t]he creation of a consistent body of law, in turn, calls for an internal standard of review relating to questions of law of correctness. So too does the existence of an appeal on questions of law or jurisdiction to this Court" (para 93).

[34] To this the Board would add that the statutory framework discloses a legislative intention to assign the Board as the "second tier" administrative decision-maker to assist in ensuring that

the statutory mandate is applied consistently.[2] This intention is supported by the Board's mandate in workplace-related matters, combined with its role as a quasi-judicial tribunal. The Board's jurisdiction pertains to questions of law, and to a lesser extent, questions of mixed fact and law. On these questions, the Board has broad remedial authority, including the explicit authority to amend or cancel the decision or order of an adjudicator.

[35] Given the foregoing analysis, the appropriate standard of review on a question of law is correctness.

Issue and Analysis:

[36] The first question is whether the timeframe is in dispute and if so, whether the adjudicator made an appealable error in determining the applicable timeframe.

[37] In bringing the preliminary objection, the Director outlined the relevant timeframe in an email to the adjudicator. The adjudicator's decision rested entirely on the Director's representations. Among the Director's representations was the following: "the Director served the business corporation and both corporate directors on February 4, 2021 via registered mail." The adjudicator took this to mean that the Director had sent the wage assessment by registered mail on February 4, 2021. The adjudicator then calculated the deemed service date based on this interpretation.

[38] After the adjudicator made her initial decision, the Director clarified, not in so many words, that the word "served" had meant that the wage assessment had been "signed for" rather than "sent". That is, the wage assessment was sent on January 27, 2021 and signed for on February 4, 2021. Therefore, the deemed service date would have been February 3, 2021.

[39] All of this could be interpreted as disclosing a misunderstanding between the Director and the adjudicator, and from that perspective, the adjudicator's email dated May 14, 2021 could be taken as demonstrating acceptance of the Director's version of the facts.

[40] Unfortunately, the adjudicator's email is not abundantly clear. It could also be taken to mean that the adjudicator's original finding must stand. However, the Director's written representations were the only facts before the adjudicator. In the email dated May 10, 2014, the adjudicator had revised the timeframe that the Director had provided. She did not take the Director

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[2] See, *Blake* at 189.

up on the offer to provide supporting documentation. That documentation could have clarified what in the adjudicator's estimation was a discrepancy between the described date of service and the calculation of the appeal period. Instead, the adjudicator disregarded the Director's evidence relating to the calculation of the appeal period. She then made the supplementary decision in disregard of further, relevant evidence. These errors constitute errors of law as per *Wieler, supra.*

[41] If the service date was February 3 or February 4, 2021, the required amount was deposited late. Given the circumstances, including the unclear email dated May 14, 2021, the Board will remit to the adjudicator the matter of confirming the service date for the purpose of calculating the appeal period.

[42] Next, the primary question is whether the adjudicator correctly applied the principle of substantial compliance in determining the scope of her authority over the appeal. The adjudicator accepted that she does not have the authority to extend or waive an appeal period contained in the Act. However, she reasoned that where there are no statutory provisions that address imperfect compliance with appeal timelines it is necessary to consider whether there was substantial compliance with the timelines. The adjudicator found that there are no such provisions and that a finding of substantial compliance would prevent the appeal from becoming a nullity. She proceeded to consider the facts, concluded that there was substantial compliance, and found that she had jurisdiction to hear the appeal.

[43] To decide whether this aspect of the adjudicator's decision was correct, it is necessary to consider the relevant statutory provisions in line with the modern principle. As mentioned, the modern principle of interpretation directs the Board to read the provision in its ordinary context and in its grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[44] The Director relies on *Ballantyne v Saskatchewan Government Insurance*, 2015 SKCA 38 (CanLII), which provides further direction with respect to the ordinary meaning of a statutory provision:

> *[20] In Sullivan on the Construction of Statutes, 6th ed (Markham: LexisNexis, 2014) at 28-29, Ruth Sullivan sets out three propositions that apply when interpreting the plain meaning of a statutory provision:*
>
> > *1. It is presumed that the ordinary meaning of a legislative text is the meaning intended by the legislature. In the absence of a reason to reject it, the ordinary meaning prevails.*

> *2. Even if the ordinary meaning is plain, courts must take into account the full range of relevant contextual considerations including purpose, related provisions in the same and other Acts, legislative drafting conventions, presumptions of legislative intent, absurdities to be avoided and the like.*
>
> *3. In light of these considerations, the court may adopt an interpretation that modifies or departs from the ordinary meaning, provided the interpretation adopted is plausible and the reasons for adopting it are sufficient to justify the departure from ordinary meaning.*

[45] The ordinary meaning of subsections 2-75(4) and (5) is that they require an appellant who is an employer or a corporate director to deposit the required amount before the expiry of the period during which an appeal may be commenced. The required amount must be deposited before the expiry of the appeal period. The deposit of that amount is a condition precedent to being eligible to appeal.

[46] It is settled law that there is no right of appeal except as provided by statute. A substantive right to extend the time for an appeal must be found in the statute creating the right of appeal: *Jordan v Saskatchewan (Securities Commission),* 1968 CanLII 519 (SK CA).

[47] In *Anita Fuller v Great Western Brewing Company Limited*, 2021 CanLII 63724 (SK LRB) [*Fuller*], the Board considered the time limitation for the filing of an appeal to this Board from an adjudicator's decision. The appellant had filed the notice of appeal late, and when she did file the notice of appeal, she did not file it in compliance with the Regulations. The Board found that the 15 business day time limitation for filing an appeal of an adjudicator's decision is fixed by the Act and that the Board has no authority to extend the appeal period set out in the Act. The Board was without jurisdiction to hear the appeal.

[48] In coming to that determination, the Board relied on the decisions in *Canadian Union of Public Employees v Mcknight*, 2016 CanLII 44867 (SK LRB); *Egware v Regina (City)*, 2016 SKQB 388 (CanLII); and *Pruden v Olysky Limited Partnership*, 2018 SKCA 75 (CanLII) [*Pruden*]. The Court of Appeal's decision in *Pruden* is especially instructive:

> *[24] In the Adjudicator Decision, the adjudicator set out ample authority for her conclusion that she could not extend the time for service of the notice of appeal. Cited extensively was Brady v Jacobs Industrial Services Ltd, 2016 CanLII 49900 (Sask LRB) [Brady], a recent decision of an adjudicator appointed pursuant to s. 3-53 of the Employment Act. In that case, after reviewing the limitation period contained at s. 3-54(2) of the Employment Act, that adjudicator explained as follows:*
>
> > *[36] The mandatory nature of the appeal requirements makes it clear the legislature intended to provide certainty as to when an appeal has been properly*

> *commenced. This permits those directly affected by a decision as well as the Ministry to know with certainty whether or not the decision has been appealed. ...*
> ...
> *[49] As an adjudicator under the [Employment Act], I only have the authority delegated to me by the Act. ... [T]ribunals created by statute cannot exceed the powers granted to them by their enabling statute, they must adhere to the statutory jurisdiction and they cannot trespass in areas where the Legislature has not assigned them authority. I have already noted above that the statutory requirements for an appeal are mandatory, including the time limit within which to file an appeal. Any authority to permit me to extend or waive the time limit for the appeal must be found in the Act.*
>
> *[50] The law in Saskatchewan is clear that any substantive right to extend the time for an appeal must be found in the statute creating the right of appeal: Jordan v. Saskatchewan (Securities Commission), SK CA, March 21, 1968; Wascana Energy Inc. v. Rural Municipality of Gull Lake No. 139 et al., 1998 CanLII 12344 (SK CA).*
>
> *[51] There is no express provision anywhere in the Saskatchewan Employment Act that gives authority to the adjudicator or to anyone else to extend or waive the time limits for an appeal.*

[49] In the decision currently on appeal, the adjudicator acknowledged that she had no authority to extend the statutory time limitation for the filing of a wage assessment appeal. She reasoned, however, that where there are no statutory provisions that address imperfect compliance with appeal timelines a finding of substantial compliance can prevent the appeal from becoming a nullity:

> *If I am incorrect about any of the dates referred to above, I find the Appellants were in substantial compliance with the statutory appeal requirements in accordance with relevant caselaw on the issue. I refer the parties to the Saskatchewan Labour Relations Board's decision of Saskatchewan (Employment Standards) v. Maxie's Excavating, 2019 CarswellSask 61 and to the Saskatchewan Court of Appeal decisions referred to therein. The cases tell us that where there are no provisions in the Act addressing imperfect compliance with appeal timelines, a finding of substantial compliance with the same can prevent the appeal from becoming a nullity. While I do not have the authority to extend or waive an appeal period under the Act, I do have the authority to consider the facts and make a determination of substantial compliance with the statutory requirements.*

[50] In making this finding, the adjudicator relied on *Director of Employment Standards v Maxie's Excavating*, 2018 CanLII 8567 (SK LRB) [*Maxie's*] in which the Board considered what were then the provisions related to appeals to the Board brought by the Director. In *Maxie's*, the Board found that there were no statutory provisions to deal with imperfect compliance or noncompliance with the established time limitations and reasoned that it could address a failure to strictly comply with a finding of substantial compliance.

[51] The Board's decision in *Maxie's* was appealed, with leave, to the Court of Appeal. In *Saskatchewan (Employment Standards) v North Park Enterprises Inc.*, 2019 SKCA 69 (CanLII), the Court of Appeal allowed the appeal for reasons of procedural fairness without deciding the substantive issue.

[52] In coming to its conclusion with respect to substantial compliance, the Board in *Maxie's* relied on the following decisions: *Regina (City) v Newell Smelski Ltd.*, 1996 CanLII 5084 (SK CA) [*Newell Smelski*]; *Wascana Energy Inc. v Gull Lake (Rural Municipality No. 139)*, 1998 CanLII 12344 (SK CA) [*Wascana*]; and *Marose Investments Ltd. v Regina (City)*, 2009 SKCA 20 (CanLII) [*Marose*].

[53] In 1996, in *Newell Smelski*, the Court of Appeal considered an alleged failure to serve a notice of intention to appeal within 14 days as set out in subsection 261(1) of *The Urban Municipality Act, 1984*. The relevant requirement stated:

> *261(1) The appellant shall serve on the assessor a written notice of intention to appeal to the [Saskatchewan Municipal Board] in the prescribed form setting out a brief description of his grounds for appeal:*
>
> *(a) within 14 days after the decision of the board of revision or after the date of the registration or delivery of the notice of the decision sent to him pursuant to section 258.*

[54] The Court found that a failure did not occur, and so did not draw any conclusions about whether such failure would have extinguished the appeal. Still, it observed that not every failure to observe statutory requirements of a "procedural nature" has the effect of extinguishing the right to appeal, at 10:

> *But not every failure to observe statutory requirements of a procedural nature carries with it such effects. If the legislature does not expressly provide for the effect of imperfect compliance or non-compliance with a requirement of this nature, the matter becomes one of implication, having regard for the subject matter of the enactment; the purposes of the requirement; the prejudice caused by the failure; the potential consequence of a finding of nullity; and so on.*

[55] In drawing this conclusion, the Court, at 10, relied on *Secretary of State v Langridge* [1991] 3 All ER 591 (C.A.) at 595, citing de Smith's *Judicial Review of Administrative Action* (4th ed., 1980) in which it was explained that, in the case of "procedural rules", it is necessary for a court to consider whether the rules are mandatory or directory: "The whole scope and purpose of the enactment must be considered, and one must assess 'the importance of the provision that has

been disregarded, and the relation of that provision to the general object intended to be secured by the Act.'"

[56] In 1998, in *Wascana*, the Court of Appeal considered the right of appeal to a board of revision pursuant to subsection 303(1) of *The Rural Municipality Act*. The statute stated that an appellant "may give notice" within 20 days. The Court noted that the prescribed period was incapable of extension, there was no power of enlargement under the Act, and in the absence of such a power, a statutory appeal period could not be extended. The Court found that the posting of the notice before the expiry of the 20 day period met the requirement of the Act. However, relying on *Newell Smelski*, the Court noted that even if the posting of the notice had not met the requirement of the Act the effect would not necessarily have been fatal.

[57] The Court found that, because the Legislature said nothing of the possible effects of timely posting but untimely receipt by registered mail, the matter was one of implication. It would therefore have been necessary to consider, based on the factors outlined in *Newell Smelski*, whether the effect was intended to be fatal. The Court concluded that the intention was not that the effect was to be fatal, and that, at worst, there was substantial compliance with the requirement.

[58] In 2009, in *Marose*, the Court of Appeal found that there was statutory authority to relieve against strict adherence to what were otherwise "mandatory" provisions. The Court decided that subsection 217(6) of what was then *The Cities Act* was sufficiently broad to allow a decision-maker to construe a failure to meet the "mandatory" time limit for serving a notice of appeal as a procedural error. The Legislature had provided explicit authority to the decision-maker to relieve against strict adherence.

[59] The logic of *Newell Smelski* and *Wascana* suggests that a statutory time limitation may be characterized as a procedural rule, and that in the case of procedural rules, it is necessary to consider whether the legislation provides for the effect of imperfect compliance or non-compliance.

[60] However, it was stated in *Egware* that "[i]nsofar as the Saskatchewan jurisprudence holds that this Court has no authority to enlarge the time for appeal absent a statutory provision allowing it to do so, the provision must be viewed as substantive, not procedural":

> *[37] There are cases from other jurisdictions which have held that a court has the inherent jurisdiction to extend a statutory time limit in circumstances where the limits are procedural*

> *in nature (Galea v Wal-Mart Canada Inc. (2003), 2003 CanLII 40536 (ON SC), 24 CCEL (3d) 294 (Ont Sup Ct); K.C. v College of Physical Therapists of Alberta (1996), 1996 CanLII 10563 (AB QB), 49 Alta LR (3d) 160 (Alta QB).*
>
> *[38] A time limit is substantive if the statute intends it to be a condition of appeal, and it is procedural if the limit is merely directive.*
>
> *[39] As discussed above, the case law in Saskatchewan is quite clear. Insofar as the Saskatchewan jurisprudence holds that this Court has no authority to enlarge the time for appeal absent a statutory provision allowing it to do so, the provision must be viewed as substantive, not procedural. This conclusion is supported by Bassett v Canada (1986), 1987 CanLII 4873 (SK CA), 53 Sask R 81 (Sask CA) [Bassett] where the Court of Appeal held at para 42:*
>
> > *42 The limitation period is substantive and cannot be altered by a rule.....this court has decided that it does not have jurisdiction to extend the time to appeal unless such discretion exists in the statute itself.*
>
> *[40] Based on the prevailing jurisprudence in this province, I find the time limit for appeal set forth in s. 329(4) of the Act to be substantive and not merely procedural.*

[61] In *Brady v Jacobs Industrial Services Ltd*, 2016 CanLII 49900 (SK LA), it was stated, at paragraph 52, that a "[f]ailure to comply with a statutory time limit, however, is not a technical irregularity. It is a substantive matter that goes to jurisdiction[.]"

[62] Furthermore, the wording of the Act requires that a deposit be made as a condition of being eligible to appeal. "Eligibility" to appeal is a substantive right.

[63] Setting aside these reservations, the Board will proceed to consider whether the legislation provides for the effect of imperfect compliance or non-compliance, as suggested by *Newell Smelski* and *Wascana*.

[64] The reasoning of *Newell Smelski* and *Wascana* invokes the mandatory/directory distinction, as described by Professor Sullivan:[3]

> ***4.80 Shall"/"must".*** *When "shall" and "must" are used in legislation to impose an obligation or create a prohibition, they are always imperative. A person who "shall" or "must" do something has no discretion to decline. A person prohibited from doing something is equally devoid of lawful choice. The issue that arises in connection with "shall" and "must" is not whether they are imperative, but the consequences that flow from a failure to comply. In some legislation, the consequences are clearly set out, as in the Criminal Code or legislation that regulates through licensing or prohibition. In other contexts the legislation is silent and it is left to the courts to determine whether non-compliance can be cured.*

[3] *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis, 2014) at 91-2.

> ***4.81*** *If breaching an obligation or requirement imposed by "shall" entails invalidity or a nullity, the provision is said to be mandatory; if the breach can be fixed or disregarded, the provision is said to be directory. The term "directory" is unfortunate in so far as it implies that "shall" is sometimes not imperative, that it sometimes has the force of a mere suggestion. The confusion is compounded when "mandatory" and "imperative" are used interchangeably – that is, when "mandatory" is used to indicate that a provision is binding or "imperative". These are distinct concepts. "Shall" and "must" are always imperative (binding); neither ever confers discretion. But they may or may not be mandatory; that is, breach of a binding obligation or requirement may or may not lead to nullity. The mandatory-directory distinction reflects the fact that there is more than one way to enforce an obligation.*

[65] A related issue was addressed in *Beauval Trucking and Construction Ltd. v Laprise,* 1997 CanLII 10922 (SK QB) [*Beauval*]. In *Beauval*, the Court considered the relevant provisions of section 62 of *The Labour Standards Act*, RSS 1978, c L-1, which stated:

> *62(1) An employer or corporate director who disputes liability for the amount stated in a wage assessment, or an employee who disputes the amount of wages owing as set out in a wage assessment, may serve a notice of appeal on the registrar of appeals within 21 days after the date of service of the wage assessment.*
>
> *(2) A notice of appeal must set out the grounds of appeal.*
>
> *(3) Except in cases where moneys have been paid in pursuant to a third party demand, where the appellant is an employer or a corporate director, the employer or corporate director shall deposit with the registrar of appeals the amount set out in the wage assessment or any other amount that is prescribed in the regulations.*

[66] The factual background to the *Beauval* decision, described at page 2, is similar to the current case:

> *On February 05, 1996, Labour Standards issued a wage assessment against Beauval and McLean relating to Laprise, a former employee, for $4,591.75. The notice of assessment was served on Beauval, McLean and Laprise by registered mail. Within 21 days of receipt of the wage assessment, Beauval and McLean served notice of an appeal and tendered a cheque for $500.00 as a deposit. The cheque was returned to Labour Standards marked "insufficient funds." On March 19, 1996, Labour Standards wrote to Beauval and McLean advising that their notice of appeal could not be accepted because the deposit had not been remitted. Further, on the 20th of March, 1996, Labour Standards issued a certificate against Beauval and McLean. No further deposit was tendered and no further notice given to Beauval or McLean that Labour Standards intended to issue a certificate. That certificate was filed in, and became a judgment of, the Court of Queen's Bench. This application for judicial review was brought a year later, after garnishee proceedings by Laprise proved successful.*

[67] The Court in *Beauval* noted that the statutory scheme allowed Labour Standards to issue a certificate when the appeal period had expired and no notice of appeal had been served on the registrar of appeals in accordance with section 62. The Act, however, did not specifically make

the failure to deposit the required amount within a specified time a cause for the issuance of the certificate.

[68] The Court reviewed the statute to determine the intention of the Legislature with respect to the deposit, and more specifically, to determine whether the Legislature had intended that the deposit was required to be made at the same time as the notice of appeal. The Court concluded that it was not the intention of the Legislature that the deposit be made at the same time as the notice of appeal.

[69] In coming to this conclusion, the Court distinguished *The Labour Standards Act* from *The Small Claim Act*, RSBC 1979, c 387, which was the legislation at issue in *British Columbia Telephone Company v Providence International Investments (1985)*, 1984 CanLII 607 (BC SC), 57 BCLR 81 (Co. Ct.) [*B.C. Telephone Company*]. Section 37 of *The Small Claim Act* stated:

> *37(2) An appeal may be commenced by filing a notice of appeal in the prescribed form within 40 days after the date the decision was given . . .*
>
> *(3) At the time an appellant files a notice of appeal, he shall deposit with the registrar of the appellate court the amount of security required under subsection (4).*

[70] The B.C. Court found that subsection 37(3) necessitated strict compliance to proceed with the appeal.

[71] The Court in *Beauval* explained why the intention demonstrated by *The Labour Standards Act* was different than that demonstrated by *The Small Claim Act*:

> *The British Columbia legislation clearly states that the notice of appeal and security deposit must be filed at the same time. A reading of ss. 62(1) and (3) of the Act do not provide the same clarity. S. 62(3) does not indicate when the deposit is to be paid.*

[72] Upon review of the Act, the Court concluded that the Legislature had not intended that payment of the deposit be made within the 21 day period, and if it had, it would have provided wording to that effect. The Court explained that "there would be no doubt as to intent" had the Legislature used "wording similar to that used in the British Columbia Small Claim Act" (at 6). The Legislature could have used similar wording but had not.

[73] Similar but arguably more explicit wording has now been incorporated into the Act. Unlike the legislation considered in *Beauval*, the deposit is now a "condition of being eligible to appeal the wage assessment". In other words, the deposit is a condition precedent to a person being

eligible to appeal. In addition, the amount is explicitly required to be deposited prior to the expiry of the appeal period.

[74] To be sure, subsection 2-75(5), in isolation, does not provide for the consequence of failing to make the deposit within the statutory appeal period. However, it is necessary to interpret the provision within the context of the surrounding and related provisions. Subsections (4) and (5) are meant to be read together. Subsection (5) states that the amount "must" be deposited before the expiry of the appeal period.

[75] Both "shall" and "must" shall be interpreted as imperative: *The Legislation Act*, section 2-30. This interpretation is applicable unless a contrary statutory intention appears: *The Legislation Act*, section 2-2. There is no contrary statutory intention. While the Legislature has chosen to use different imperative words to refer to the deposit requirement and the deposit time limitation, this is consistent with the drafting style disclosed in the surrounding provisions in that "must" is an auxiliary verb utilized where the subject is inanimate.

[76] Importantly, the Court in *Beauval* recognized that the Legislature had provided for a consequence for the failure to file the notice of appeal before the expiry of the appeal period. The consequence of such a failure was that the certificate, pursuant to section 2-77, may be issued and the appeal may be prevented from proceeding. In this respect, the legislation in its current form is the same as that which was considered in *Beauval*.

[77] However, section 2-77 allows for the issuance of a certificate if a period of 15 days has elapsed after the date of service and no notice of appeal has been "served" on the director "in accordance with section 2-75".[4] As the legislation currently stands, if the appellant is an employer, and the employer files the notice of appeal without the required deposit amount prior to the expiry of the appeal period, the employer is not eligible to appeal, and the notice of appeal has not been "served" in accordance with section 2-75.

[78] Therefore, the failure of an employer to deposit the required amount prior to the expiry of the appeal period means that the employer is ineligible to appeal, the certificate may be issued, and the appeal may be prevented from proceeding.

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[4] The reference to "service" appears to be a relic from the previous legislation. A notice of appeal is not served on the Director. It is filed, pursuant to section 2-75 of the Act.

[79] In this case, the Act provides for the effect of imperfect compliance or non-compliance. The failure to deposit the amount before the expiry of the appeal period means that the employer is ineligible to appeal, and the appeal may be prevented from proceeding. Following this reasoning, the effect of a failure is not a matter of implication.

[80] However, if it were a matter of implication, *Newell Smelski* suggests that such a matter is to be determined in context, which includes the subject matter of the enactment, the purposes of the requirement, the prejudice caused by the failure, and the potential consequence of a finding of nullity. In *Beauval,* the Court observed that the object of the statute is to ensure that wages owing to employees are paid. It is important to interpret the appeal provisions harmoniously with the object of Part II of the Act. It is also important to appreciate, as did the Court in *Beauval*, the presumption against the abolishment or limitation on rights, which applies to a statutory right to bring an appeal.[5]

[81] Upon reviewing the Act as a whole, the Court in *Beauval* concluded that the Legislature did not intend that the deposit was to be paid within the same period as the service of the notice of appeal. The Court concluded that, "had it so intended, it would have provided wording to that effect". By implication, language, such as that which is found in the current Act, would be sufficient to demonstrate that, on the balance, the Legislature's intention was that the time limitation for the deposit was, in essence, mandatory in addition to being imperative.

[82] The object of the statute is to ensure that wages owing to employees are paid. The deposit is intended to discourage appeals that have little or no merit or that are brought as a means of delaying recovery of an amount owing. The consequence of a finding of nullity is monetary; the prejudice caused by the delay is also monetary. It is now abundantly clear that section 2-75 sets out a mandatory requirement to deposit the required amount prior to the expiry of the appeal period. The effect of a failure to strictly comply with this requirement is a nullity of the appeal.

[83] Finally, the authorities are clear that a person's right to appeal expires if not brought within the statutory time limitation and that, in the absence of a statutory provision providing authority to extend the time for an appeal, there is no authority to extend the time period: *Jordan v Saskatchewan Securities Commission (1968)*, 64 WWR 121 (Sask CA); *Houston v Saskatchewan Teachers' Federation*, 2009 SKCA 70; *Brady v Jacobs Industrial Services Ltd*, 2016 CanLII 49900

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[5] *Sullivan* at 497-9.

(Sask LRB); *Egware v Regina (City)*, 2016 SKQB 388 (CanLII); *Pruden v Olysky Ltd*, 2018 SKCA 75.

[84] The Board has not been asked, nor has it been necessary, to consider whether there is any contradiction in finding that a statutory tribunal that does not have authority to extend the time for an appeal could have authority to find substantial compliance where there has been imperfect compliance. Similarly, the Board has not been asked, nor has it been necessary to consider whether the logic of *Newell Smelski* and *Wascana* has been overtaken by subsequent case law. Therefore, the Board has not considered these questions.

[85] In conclusion, the adjudicator's decision is not correct. Assuming the service date was February 3 or February 4, 2021, the appellants deposited the amount required after the expiry of the appeal period and therefore were ineligible to appeal. The effect of the failure to strictly comply with the requirement to deposit the amount before the expiry of the appeal period results in a nullity of the appeal. The adjudicator had no authority to make a finding of substantial compliance.

[86] Subsection 4-10(5) of the Act gives the Board the power to affirm, amend or cancel the adjudicator's decision, or to remit the matter back to the adjudicator. The Board will remit to the adjudicator the matter of confirming the service date for the calculation of the appeal period and confirming whether the required amount was deposited before the expiry of the appeal period, with a further direction to amend the decision consistent with the Board's conclusions with respect to the principle of substantial compliance.

[87] An appropriate order will be issued with these Reasons.

DATED at Regina, Saskatchewan, this **1st** day of **December, 2021.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson